

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

John Dasta,

Plaintiff,

v.

ORDER

Civil No. 04-4475 (MJD/RLE)

Bobby Shearin, et al.,

Defendants.

The above-entitled matter comes before the Court upon the parties' objections to the Report and Recommendation of Chief United States Magistrate Judge Raymond L. Erickson dated November 15, 2007.

Pursuant to statute, the Court has conducted a de novo review of the record. 28 U.S.C. § 636(b)(1); Local Rule 72.2(b). Based on that review the Court ADOPTS the Report and Recommendation, with the exception that Plaintiff's negligence claim that arises out of medical treatment received at FCI-Cumberland is dismissed.

In its objection to the Report and Recommendation, the government agrees that the constitutional claims against Warden Bobby Shearin and Dr. Leonardo Giron should be transferred, and that summary judgment in

favor of Defendants Hayes, Nelson and Richards was appropriate. The government objects only to that portion of the Report and Recommendation transferring the negligence claim arising from medical treatment received at FCI-Cumberland. With respect to this claim, the government asserts that this Court does not have subject matter jurisdiction, as Plaintiff did not exhaust his administrative remedies pursuant to 28 U.S.C. § 1631. In support, the government has presented the Supplemental Declaration of Ann Norenberg. In her supplemental declaration, Ms. Norenberg clarifies that Plaintiff never filed any administrative tort claims concerning malpractice/negligence claims, but that he did exhaust his administrative remedies under the PLRA with respect to his Bivens claims. Supp. Decl. Norenberg, ¶ 3.

Plaintiff filed objections to the Report and Recommendations, but did not respond to the government's position that Plaintiff failed to demonstrate that he filed the appropriate administrative claims, nor did he submit proof that such an administrative claim was filed. As the record now demonstrates that Plaintiff did not file the requisite administrative

claim to preserve his negligence claim under the FTCA, this Court does not have subject matter jurisdiction over that claim.

In his objections to the Report and Recommendation, Plaintiff challenges some of Magistrate Judge Erickson's factual findings. The Court has reviewed the arguments and the record, and finds the Magistrate Judge's factual findings are not erroneous.

IT IS HEREBY ORDERED that:

1. Defendants Shearin and Giron's Motion for Summary Judgment [Doc. No. 58] is GRANTED in part and DENIED in part as follows. Plaintiff's constitutional claims against these defendants shall be transferred to the District of Maryland, Baltimore Division. Plaintiff's negligence claim against these defendant that arises out of medical treatment received at FCI-Cumberland, Md. is dismissed.

2. Defendants Hayes, Nelson and Richards' motion for Summary Judgment [Doc. No. 58] is GRANTED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: January 22, 2008

s / Michael J. Davis
Michael J. Davis
United States District Court

Civil No. 04-4475